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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1041

EX PARTE SHEARN MOODY, JR.,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

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In the Supreme Court of the United States

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No. .....

EX PARTE SHEARN MOODY, JR.,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

TO THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, Shearn Moody, Jr., prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Alabama entered on August 19, 1977, affirming judgments of the Circuit Court of Jefferson County, Alabama, in the two cases described herein, which said judgments held the Petitioner to be in constructive criminal contempt and imposed jail sentences and fines as punishment.

OPINIONS BELOW

The opinion of the Supreme Court of Alabama affirming the judgments of the Circuit Court of Jefferson County, Alabama, is reported in *Ex Parte Moody,* 351 So.2d 538 (August 17, 1977; application for rehearing overruled September 30, 1977). The opinion of the Supreme Court of Alabama and the order denying the Petitioner's application for rehearing appear in the Appendix.

JURISDICTION

The Supreme Court of Alabama entered its judgment on August 19, 1977. The Petitioner timely filed an application for rehearing in the Supreme Court of Alabama which was overruled on September 30, 1977. The Petitioner presented a timely motion for extension of time within which to file a petition for writ of certiorari in this Court to the Honorable Justice Lewis F. Powell, Jr., who signed an order on December 16, 1977, extending the time for filing a petition for writ of certiorari in this cause to January 24, 1978. A copy of this order appears in the Appendix.

The jurisdiction of this Court is invoked under 28 U.S.C., § 1257(3), which said statutory provision is believed to confer jurisdiction on this Court.

QUESTIONS PRESENTED

1. Whether a constructive criminal contempt prosecution in which the accused may be punished by imprisonment is a criminal case and subject to the constitutional requirements, guaranties, and privileges applicable to all criminal cases.

2. Whether service of process on the accused in a state criminal contempt prosecution which is not made in compliance with state statutes specifying methods for service of process denies the accused equal protection of the laws.

3. Whether a defendant in a state criminal prosecution in which imprisonment is a permissible form of punishment may be tried in absentia.

4. Whether allowing the use as evidence in a state criminal contempt prosecution of (a) an involuntary deposition of the accused and (b) depositions taken in other cases and transcripts of hearings in other proceedings violates the accused's right against self-incrimination and right to confront the witnesses against him.

5. Whether the refusal by a state court to apply a uniform statute of limitations to criminal contempt prosecutions denies equal protection of the laws.

6. Whether a criminal contempt conviction in a state court may be rested on a state court injunction that has the effect of proscribing a civil action in the federal courts under 42 U.S.C., § 1985 and 28 U.S.C., § 1343.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment V

. . . No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . .

Constitution of the United States, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .

Constitution of the United States, Amendment XIV

. . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS INVOLVED

Code of Alabama 1940, Title 13, § 9

The courts of this state may punish for contempt by fine and imprisonment, one or both, as follows: . . . the circuit courts by fine not exceeding fifty dollars, and imprisonment not exceeding five days . . . .

Code of Alabama 1940, Title 13, § 143

The circuit court, or judges thereof when exercising equity jurisdiction and powers may punish for contempt by fine not exceeding fifty dollars, and by imprisonment, not exceeding five days, one or both.

STATEMENT OF THE CASE

The criminal contempt convictions which this petition seeks to review arose out of a receivership proceeding in the Circuit Court of Jefferson County, Alabama. The subject matter of that receivership proceeding was an insurance company, Empire Life Insurance Company of America (hereafter "Empire"). (See App., order dated June 29, 1972). The Petitioner was the chief executive officer and largest stockholder of Empire and intervened in the Empire receivership proceeding to contest the claim of insolvency and the manner in which Empire's assets were precipitantly revalued. He was adjudged to be in constructive criminal contempt for violating certain orders entered during the receivership proceeding. The contempt charges against Petitioner were instituted on petitions filed by Protective Life Insurance Company (hereafter "Protective"), which was also an intervening party in the Empire receivership proceeding.

Protective's petition made four charges against the Petitioner and he was convicted on each of them in the trial court and received the maximum punishment allowable under the Alabama Code for criminal contempt. (See App., Criminal Contempt Judgments dated November 1, 1976). On review by the Supreme Court of Alabama two of the convictions were reversed and two were affirmed. (See App., opinion of August 19, 1977).

The cases in which the convictions were affirmed by the Supreme Court of Alabama were Case Number SC 2337 (referred to as Case Two in the Alabama Supreme Court opinion) and Case Number SC 2338 (referred to as Case Four in the Alabama Supreme Court opinion). In SC 2337 (Case Two) the Petitioner was accused of violating an injunction of the trial court dated January 6, 1975 (see App., Order dated January 6, 1975), by aiding or encouraging the filing of an amended complaint in a pending action by an Empire policyholder in the U. S. District Court for the Middle District of Alabama asserting a claim under 42 U.S.C., § 1985. This case (known as the Allmon case) questioned some of the actions taken by the receivership court and the court appointed receiver. SC 2338 (Case Four) was based on the failure of the Petitioner to appear in court to demonstrate that he had purged himself of civil contempt.

The Petitioner is a resident of the State of Texas and was not personally present in the State of Alabama at any time after the criminal contempt prosecutions were initiated. Notice of the initiation of the prosecutions and the time for hearing of each was sent to the Petitioner at his residence in Galveston, Texas, by mail. (See App., orders to show cause dated August 19, 1976). No Alabama statute authorizes service of process in this manner in criminal contempt cases.

The four contempt charges against the Petitioner were continued, once due to the Petitioner's illness. A second request for a continuance due to illness was denied. The trial court entered an order requiring the cases to proceed to trial in the Petitioner's absence after an examining physician selected by Protective reported that the Petitioner's physical condition was such that subjection to the pressures of a trial might be injurious to his health. Over the objections of Petitioner's counsel the trial was conducted in Petitioner's absence.

During the course of the trial Petitioner's deposition taken involuntarily in another proceeding and depositions of other witnesses taken in other cases and transcripts of testimony taken in other proceedings were admitted into evidence over Petitioner's plea that the charge in SC 2337 (Case Two) was barred by the one year statute of limitations applicable to misdemeanors under the Code of Alabama (Title 15, § 222).

The Petitioner filed a timely petition for certiorari in the Supreme Court of Alabama to review the contempt judgments. On August 19, 1977, the Supreme Court of Alabama entered its judgment reversing two of the convictions and affirming two of the convictions.

REASONS FOR GRANTING THE WRIT

I.

The Supreme Court of Alabama Erroneously Concluded That a Criminal Contempt Prosecution Is Not a Criminal Case.

The opinion of the Supreme Court of Alabama acknowledges that a criminal contempt prosecution has many features of criminal prosecutions in general but concludes, largely upon the authority of the decision of this Court in *Blackmer* v. *United States,* 284 U.S. 421 (1932), that such a case is not a criminal prosecution "as that term is commonly understood" and that the accused in a criminal contempt prosecution is not entitled to the same constitutional rights as defendants in criminal prosecutions generally. This conclusion runs contrary to the decisions of this Court in *Gompers* v. *United States,* 233 U.S. 604 (1914); *Michaelson* v. *United States,* 266 U.S. 42 (1924); *Bloom* v. *Illinois,* 391 U.S. 194 (1968); *Codispoti* v. *Pennsylvania,* 418 U.S. 506 (1974) and *Taylor* v. *Hayes,* 418 U.S. 488 (1974). In *Gompers,* Mr. Justice Holmes, in speaking of the nature of criminal contempt, said:

> If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech.

To this extent the *Blackmer* case is obviously in conflict with the *Gompers, Michaelson, Bloom, Codispoti* and *Taylor* cases.

This ruling by the Alabama Supreme Court also gives unwarranted weight to the *Blackmer* case. The *Blackmer* case was not a typical criminal contempt prosecution.

Rather, it was a special statutory proceeding against the property of a defaulting witness residing in a foreign country, under what is now codified as 28 U.S.C., § 1783-84. It did not involve imprisonment as punishment.

This fundamental error by the Alabama Supreme Court infects other specific rulings made by the Court in its August 19, 1977 opinion. The writ should be granted to correct this error of the Alabama Supreme Court and to resolve the conflict between the *Blackmer* case, which the Alabama Supreme Court relied on, and the *Gompers, Michaelson, Bloom, Codispoti* and *Taylor* cases.

II.

Allowing an Unusual and Statutorily Unauthorized Method for Service of Process in This Case Has the Effect of Denying the Petitioner the Equal Protection of the Laws.

No Alabama statute (or prior appellate court decision) has authorized the service of process in a criminal contempt case by mail. Under Alabama law personal service of process is required where no alternate statutory methods are specified. See *Naro* v. *State*, 212 Ala. 5, 101 So. 666 (1924). In these contempt prosecutions the method of service of process was "created" by an order of the trial judge for use only in these cases. (See App., orders of August 19, 1976). Utilizing a contrived method of process in these cases was rank discrimination against the Petitioner, and deprived him of equal protection of the laws as guaranteed by the 14th Amendment to the Constitution. See *Griffin* v. *Illinois*, 351 U.S. 12 (1956).

III.

The Trial of Criminal Contempt Charges Against the Petitioner in His Absence Due to Physical Infirmity Infringed His Sixth Amendment Right of Confrontation.

After securing a report from a physician selected by the prosecutor which confirmed the report of the Petitioner's physician that attending a trial was a threat to Petitioner's health the trial judge ordered that the trial proceed in the Petitioner's absence. Petitioner was not present at the trial. The August 19, 1977 decision of the Alabama Supreme Court sanctions trial in absentia in criminal contempt cases.

The Alabama Supreme Court cites *Blackmer* v. *United States*, 284 U.S. 421 (1932) to support its sanctioning of trial in absentia. The *Blackmer* case, as previously noted, is at odds with earlier and later cases of this Court on the subject of the nature of criminal contempt. See *Gompers* v. *United States*, 233 U.S. 604 (1914); *Michaelson* v. *United States*, 266 U.S. 42 (1924); *Bloom* v. *Illinois*, 391 U.S. 194 (1968); *Codispoti* v. *Pennsylvania*, 418 U.S. 506 (1974) and *Taylor* v. *Hayes*, 418 U.S. 488 (1974). As previously pointed out, the *Blackmer* case was not a typical criminal contempt prosecution. If the opinion in the *Blackmer* case had as its purpose the establishment of a general rule that defendants in criminal contempt prosecutions may be tried in absentia this holding should be reviewed by this Court because it is contrary to the principle of the cases cited above and the cases which have declared the Sixth Amendment right of confrontation, such as *Lewis* v. *United States*, 146 U.S. 370 (1892) and *Illinois* v. *Allen*, 397 U.S. 337 (1970).

IV.

The Application of a Variable, Rather Than a Specific, Statute of Limitations to the Criminal Contempt Prosecutions in This Case Denies the Petitioner Equal Protection of the Laws.

The statute of limitations applicable to misdemeanors in Alabama is one year. *Ala. Code*, Tit. 15, § 222 (1940). Court decisions have generally held that criminal contempt prosecutions are subject to the same limitations as crimes which involve similar punishment, even though the limitation statutes do not specifically include criminal contempt prosecutions. See, *e.g.*, *Gompers* v. *United States*, 233 U.S. 604 (1914); *Pendergast* v. *United States*, 317 U.S. 412 (1943). This would mean that the one year statute of limitation would be applicable in Alabama. Rather than following this rule, or even a rule that there is no statute of limitations, the Alabama Supreme Court adopted a rule which allows the statute of limitation to be different for different cases, different defendants, or different situations. This obviously is an unequal application of the laws and a denial of equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States.

V.

The Evidentiary Rules Which Have Constitutional Bases Apply in Criminal Contempt Prosecutions. This Includes the Right Against Self-Incrimination and the Right to Confront Witnesses.

A. One of the items of documentary evidence admitted against the Petitioner in this case was a deposition of the Petitioner taken involuntarily in another proceeding after the occurrence of the events on which the criminal contempt prosecutions were based. This deposition was

received in evidence over Petitioner's objection that it was taken in violation of his Fifth Amendment right against self-incrimination. See *Bloom* v. *Illinois*, 391 U.S. 194 (1968); *Michaelson* v. *United States*, 266 U.S. 42 (1924).

B. During the trial a deposition taken in another case in which the Petitioner was not a party (Petitioner's Exhibit 19) and transcripts of testimony taken in two hearings held prior to the initiation of the criminal contempt prosecutions (Petitioner's Exhibits 22 and 23) were received in evidence. No showing of death of a witness or other unusual circumstances was made prior to the admission of these exhibits. The use of such evidence clearly violates the Sixth Amendment constitutional right to confront the witnesses. See *Pointer* v. *Texas*, 380 U.S. 400 (1965).

VI.

The Restraint in the January 6, 1975 Injunction, Which Was the Basis of the Contempt Prosecutions Against the Petitioner, Was an Unauthorized Restraint by a State Court on the Assertion of a Federal Right in a Federal Court.

The January 6, 1975 order of the trial court restrains the Petitioner and others from initiating or amending any action in any court affecting the receivership, the receiver, Protective, and others. (See App., order of January 6, 1975). The order is sweeping and comprehensive in its scope. The accusation against the Petitioner in the contempt prosecutions was that he, in violation of the January 6, 1975 order, aided and encouraged an Empire policyholder to file an action in the federal court under a federal statute (42 U.S.C., § 1985) questioning some of the actions of the receiver and the receivership court. To the extent the January 6, 1975 injunction prohibits the filing of such an action by the Petitioner, or anyone else, it clearly

appears contrary to this Court's decision in *Donovan* v. *Dallas*, 377 U.S. 408 (1964). Since the January 6, 1975 order is the basis of the contempts charged, and since the contempts charged involve the filing of a lawsuit in the federal court under the Federal Civil Rights Act, 42 U.S.C., § 1985 (and 28 U.S.C., § 1343), the whole basis of the contempt prosecutions clearly becomes an unconstitutional exercise of power by a state court. For this reason the convictions of the Petitioner should be vacated.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have served a copy of the foregoing Petition for Writ of Certiorari upon the Honorable Drayton Nabers, Jr., Attorney of Record for Protective Life Insurance Company, by mailing three copies of the same to him in the United States mail, properly addressed and with sufficient postage prepaid, this the 20th day of January 1978.

WILLIAM H. MILLS
Of Counsel for Petitioner

APPENDIX

In re Criminal Contempt Prosecution against Shearn Moody, Jr., arising out of STATE of Alabama ex rel. PAYNE, etc.

v.

EMPIRE LIFE INSURANCE CO. OF AMERICA, etc.

Ex parte Shearn MOODY, Jr.

SC 2336 to 2339.

Supreme Court of Alabama.

Aug. 19, 1977.

Rehearing Denied Sept. 30, 1977.

The Circuit Court, Jefferson County, William C. Barber, J., adjudged petitioner in criminal contempt in four instances, and petitioner sought certiorari. The Supreme Court, Jones, J., held that: (1) jurisdiction was properly invoked over petitioner; (2) first charge of contempt had to fail for lack of timeliness; (3) third charge had to be reversed for lack of specificity of charge, but (4) as to second and fourth charges, notice, timeliness and specificity of charges were sufficient to sustain findings of contempt.

Affirmed in part and reversed and rendered in part.

Bloodworth, J., filed opinion concurring in part and dissenting in part in which Maddox and Beatty, JJ., joined.

Almon, J., filed opinion concurring in part and dissenting in part.

Beatty, J., filed opinion concurring in part and dissenting in part in which Maddox, J., joined.

1. Contempt (Key) 3, 4

If purpose for which court's contempt power is exercised is to coerce compliance with order of court, action is one for "civil contempt"; if, however, purpose is to preserve authority and dignity of the court, and to punish contemnor for noncompliance with order of court, contempt is "criminal."

See publication Words and Phrases for other judicial constructions and definitions.

2. Contempt (Key) 2

An act or omission, if not done in presence of court but at a distance, is termed "constructive contempt."

See publication Words and Phrases for other judicial constructions and definitions.

3. Contempt (Key) 39

Court has discretionary power to enforce its orders and to punish recalcitrance. Code of Ala., Tit. 13, § 5.

4. Contempt (Key) 40

Proceeding in contempt for noncompliance with lawful court decree is sui generis and not a criminal prosecution as that term is commonly understood.

5. Constitutional Law (Key) 273

Because sanctions employed by the court, pursuant to criminal contempt adjudication, partake so heavily of criminal nature it is essential in all but narrow category of cases that constitutional principles be applied to ensure that substantial due process is afforded accused contemnor

and thus task of Supreme Court is to balance inherent power of court to preserve its dignity and honor by contempt process while preserving to accused contemnor right to be treated with fairness and substantial due process.

6. Contempt (Key) 44

Jurisdiction of court in a criminal contempt proceeding is not the same as that in proceeding from which contempt arose since criminal contempt proceeding is a totally separate action.

7. Constitutional Law (Key) 273

In determining whether requisites for obtaining jurisdiction over accused contemnor have been complied with, circumstances of each case must be considered in light of substantial due process requirements.

8. Contempt (Key) 55

Where petitioner was voluntary party in receivership action, he avoided service of process by encamping and remaining outside state, attorneys actively engaged in his employ were served, service by registered and first-class mail was sent to his home in Texas, and he had actual notice of action as shown by his attorney's appearance and motions for continuance, service effected was best notice available under the circumstances and thus jurisdiction was properly invoked over petitioner in criminal contempt action.

9. Constitutional Law (Key) 273

Substantial due process requires that accused contemnor be given proper notice, which must contain sufficient information to advise accused of nature and particulars of conduct charged, and reasonable opportunity to

be heard; it also entails assistance of counsel, if requested, and right to be present, give testimony and call witnesses.

10. Contempt (Key) 54(4)

In criminal contempt proceedings, pleading need not be stated with particularity required in true criminal case but some degree of specificity is required to enable accused contemnor to adequately prepare defense.

11. Contempt (Key) 55

Where petition and order to show cause, as regards one charge, merely referred to "disobedience and failure to comply with" order, which contained eight separate requirements for petitioner to purge himself, and nowhere was there stated which of such requirements petitioner failed to meet, show cause order was too general to apprise petitioner of conduct for which he was to be held in contempt and thus finding of criminal contempt had to be reversed for lack of specificity of charge.

12. Contempt (Key) 54(4)

Where criminal contempt charges contained general averments that one primary act was required, such charges did not fail for indefiniteness since petitioner was sufficiently apprised of which actions he had to defend against.

13. Contempt (Key) 61(4)

Where every opportunity to be present was afforded petitioner, petitioner was not compelled to attend but if he so elected, he would be given chance to testify and explain charges against him, and in recognition of possible physical infirmities, trial court stated that petitioner could be given daily transcripts of proceedings and allowed to give his testimony by way of deposition, petitioner had

right to be present but waived that right by his actions and thus fact that he was not personally present at hearing did not render his criminal contempt convictions void.

14. Contempt (Key) 46

Appropriate time limitation for bringing criminal contempt charge, which is not subject to one-year statute of limitations for misdemeanors, must be determined on case-by-case basis by determining nature of act or acts, prejudice delay may cause accused and whether delay is unreasonable. Code of Ala., Tit. 1, § 7; Tit. 15, § 222.

15. Contempt (Key) 46

Fact that criminal contempt petition was not filed until almost two years after act allegedly occurred was unfair and prejudicial to petitioner since witnesses and other evidence could easily have become unavailable in interim, and thus contempt charge alleged in such petition had to fail for lack of timeliness.

16. Contempt (Key) 46

Charges of criminal contempt which concerned acts within one month prior to petition in one case and, in the other, continuing acts that clearly extended any limitation period, did not fail for lack of timeliness.

17. Judges (Key) 49(2)

Judge, whose statements indicated little more than that he felt he had been fair with petitioner but that petitioner had not been fair with court and that he was growing impatient with petitioner's failure to cooperate, and who was to be commended for patience displayed in light of petitioner's consistently recalcitrant behavior,

did not abuse his discretion by failing to recuse himself in criminal contempt proceedings.

18. Pretrial Procedure (Key) 713

Appropriateness of continuance is within sound discretion of the trial court.

19. Appeal and Error (Key) 966(1)

Continuance is not favored and trial court's discretion in acting on motion for continuance will not be reversed absent showing of gross abuse.

20. Contempt (Key) 40

Where trial court granted conditional continuance, subject to physical examination of petitioner, court permitted petitioner to testify by deposition if he so desired, and court did all within its power to recognize petitioner's infirmities while at same time expeditiously proceeding with important controversy, not granting continuance requested in connection with criminal contempt proceedings was not abuse of discretion.

21. Contempt (Key) 68

Trial court, which in addition to statutory punishment of $50 and five days in jail, ordered petitioner to pay reasonable attorney fees to insurer for expenses incurred in preparation and prosecution of contempt proceedings exceeded its authority. Code of Ala., Tit. 13, § 9.

22. Costs (Key) 172

Generally, attorney fees are recoverable only where authorized by statute, when provided in contract or in equitable proceeding where efforts of attorney create fund out of which fees may be paid.

23. Contempt (Key) 68

Award of attorney fees in criminal contempt proceedings, although not proper, did not render entire judgment void but rather could be considered as mere surplusage and severed from judgment decree.

24. Contempt (Key) 3, 4

In view of distinction between civil and criminal contempt, same acts may justify court resorting to both coercive and punitive measures, and thus petitioner could not be heard to complain that basis of criminal contempt adjudication was also basis of civil contempt.

William H. Mills for Rogers, Howard, Redden & Mills, Birmingham, for petitioner.

Drayton Nabers, Jr. and William A. Robinson, Birmingham, for respondent, Protective Life Ins. Co.

JONES, Justice.

These cases are before the Court upon writs of certiorari to review a decree of the Circuit Court of Jefferson County adjudging the petitioner, Shearn Moody, Jr., in criminal contempt for the violation of several injunctions and orders issued by that Court. Separate petitions, which had been consolidated on a single record, were filed in this Court to review four convictions.

Moody is the president, chairman of the board, and principal stockholder of the Empire Life Insurance Company of America. Respondents are The Honorable William C. Barber, Judge, Circuit Court of Jefferson County, before whom the contempt proceedings were heard, and Protective Life Insurance Company.

Receivership and *Allmon*

In order to understand the issues raised, it is necessary to set forth a brief summary of the receivership proceedings and other ancillary and related actions out of which this case arose.

On June 29, 1972, Empire was placed in receivership and ordered liquidated. Moody objected to this and was permitted to intervene as a defendant. Reinsurance was authorized through Protective on June 14, 1974. This reinsurance has been recently upheld by this Court. *Moody* v. *State ex rel. Payne,* 344 So.2d 160 (Ala.1977).

The four criminal contempt judgments are based upon Moody's interference with the receivership proceedings and his involvement in the case of *Allmon* v. *Bookout,* Civil Act No. 74-377-N, United States District Court for the Middle District of Alabama.

Subsequent to the receivership determination, Moody, through counsel, filed various suits and claims against the Receiver, in that capacity and individually. One such case, *Allmon,* was filed on November 22, 1974. Moody's involvement in *Allmon* is the basis of the first judgment of contempt. The trial Court held that an implied injunction prohibiting interference with the receivership arose after Empire was placed in receivership, and that Moody violated this implied injunction by filing *Allmon.*

On January 6, 1975, after *Allmon* was filed, the trial Court issued an injunction in an attempt to prevent Moody's further interference with the receivership. Thereby, Moody was enjoined from filing, financing or sponsoring any action, or amendment to any action, on behalf of any party, against the Receiver or others without prior approval of the Court. See *Moody* v. *State ex rel. Payne,* 295 Ala. 299, 329 So.2d 73 (1976). On January 28, 1975,

without seeking approval from the Court, counsel for Moody filed an amended complaint in *Allmon.* It is the violation of this January 6, 1975, injunction which is the basis of the second contempt adjudication.

An order dated March 10, 1975 (as vacated and superseded by an order dated April 30, 1975) held Moody in civil contempt for violating the January 6 injunction, and specified eight requirements for Moody to purge himself. It is the failure to obey the April 30 order which is the basis of the third contempt adjudication.

On June 16, 1976, the Court ordered Moody to personally appear on July 19 and show that he had purged himself by complying with the April 30, 1975, order. Moody's failure to appear is the basis of the fourth adjudication of criminal contempt.

Criminal Contempt Proceedings

The criminal contempt proceedings against Moody were initiated on August 19, 1976. A petition was filed by Protective and served upon each of three attorneys of record for Moody. On the basis of the petition and supporting papers, the trial Court issued four orders requiring Moody to appear and show why he should not be held in criminal contempt. Moody was served, as directed by the Court, at his address in Galveston, Texas, by both registered and first class mail.

Prior to the scheduled hearing, counsel for Moody filed a motion seeking a continuance on the basis of Moody's health and alleged inability to travel. The Court directed Moody to submit to physical examination and to file medical records and reports concerning his health. After further hearings, the Court held that a general continuance was not warranted, but a conditional continuance was granted subject to a physical examination of Moody.

On September 2, 1976, Moody filed separate motions to quash service, to quash the orders to show cause, and to dismiss. All were subsequently overruled. Trial was commenced on September 13, 1976. The Court determined *ex mero motu* not to compel Moody's attendance, but to leave the decision whether to appear to Moody, himself. Further motions to continue and for Judge Barber to recuse himself were also denied.

The Court below considered voluminous documentary evidence and oral testimony. The evidence was left open, however, to permit Moody to submit to deposition testimony in explanation of his position and contentions. Because no such testimony was forthcoming, the Court treated the evidence as closed on November 1, 1976.

Pursuant to Tit. 13, § 9, Code, Moody was sentenced to confinement in the Jefferson County jail for four consecutive five-day terms and ordered to pay four fines of fifty dollars each. The Court also held that counsel for Protective was entitled to recover reasonable attorney's fees from Moody. The amount of such attorney's fees, however, was to be determined at a subsequent hearing. This review followed. We affirm in part, and reverse in part.

I.

Numerous issues have been raised by Moody, many of which can only be answered by first resolving the basic questions of what is the nature of a criminal contempt proceeding and what are the requirements of due process of law in such actions.

[1-3] If the purpose for which the court's contempt power is exercised is to coerce compliance with an order of the court, the action is one for "civil" contempt. If,

however, the purpose is to preserve the authority and dignity of the court, and to punish the contemnor for noncompliance with an order of the court, the contempt is "criminal." 17 Am.Jur.2d, *Contempt*, § 4. If the act or omission is not done in the presence of the court, but at a distance, it is termed "constructive" contempt. *Ex parte Seymore*, 264 Ala. 689, 89 So.2d 83 (1956). Both statute and cases affirm the discretionary power of the court to enforce its orders and to punish recalcitrance. Tit. 13, § 5, Code, and *Ex parte Hill*, 229 Ala. 501, 158 So. 531 (1935).

[4, 5] A proceeding in contempt for noncompliance with a lawful court decree is *sui generis* and not a "criminal prosecution" as that term is commonly understood. *Blackmer* v. *United States*, 284 U.S. 421, 52 S.Ct. 252, 76 L.Ed. 375 (1932), and *Robertson* v. *State*, 20 Ala.App. 514, 104 So. 561 (1924). Because the sanctions employed by the court, pursuant to a criminal contempt adjudication, partake so heavily of a criminal nature (i. e., the actual or potential restraint of the body), however, it is essential in all but a narrow category of cases that constitutional principles be applied to this process to assure substantial due process is afforded the accused. The task of this Court, then, is to balance the inherent power of the Court to preserve its dignity and honor by the contempt process, while preserving to the accused contemnor the right to be treated with fairness and substantial due process.

[6, 7] The jurisdiction of the court in a criminal contempt proceeding is not the same as that in the proceeding from which the contempt arose; and this for the reason that the criminal contempt proceeding is a totally separate action. *Robertson*, supra. In determining whether the requisites for obtaining jurisdiction over the accused have been complied with, the circumstances of each case must

be considered in light of substantial due process requirements.

> "The reasonableness and hence the constitutional validity of any chosen method [of service] may be defined on the ground that it is in itself reasonably certain to inform those affected . . ." *Mullane* v. *Central Hanover Bank and Trust Co.*, 339 U.S. 306, 315, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950).

[8] In reviewing the particular circumstances of this case, the record indicates that: Moody was a voluntary party in the receivership action; he avoided service of process by encamping and remaining outside the state; attorneys actively engaged in his employ were served; service by registered and first class mail was sent to his home in Texas; and he had actual notice of the action, as shown by his attorney's appearance and motions for continuance. Considering these circumstances, and balancing them against the rights of the accused, we think that the service effected was the best notice available under the circumstances. It was calculated to inform Moody of the pending action so as to afford him sufficient opportunity to choose for himself whether to appear, acquiesce, or contest. It would be anomalous, indeed, if a nonresident could avail himself of the use of our courts and then be free to disobey the Court's lawful order and forever insulate himself from the Court's inherent power to punish contempt by merely absenting himself from the state.

The policy of recent decisions is to expand *in personam* jurisdiction to its due process limits. See, e. g., ARCP 4.2, Comments, pp. 34-35. Decisions in this area are based on notions of fairness and substantial justice. *Elkhart Engineering Corp.* v. *Dornier Werke*, 343 F.2d 861 (5th Cir. 1965). For these reasons, we think jurisdiction was properly invoked over the accused in the instant action.

II.

[9] Substantial due process requires that the accused shall be given proper notice, advised of the charges and given a reasonable opportunity to be heard. It also entails the assistance of counsel, if requested, the right to be present, give testimony and call witnesses. The notice must contain sufficient information to advise the accused of the nature and particulars of the conduct charged. *Yates* v. *United States*, 316 F.2d 718 (10th Cir. 1963); *Hunter* v. *State*, 251 Ala. 11, 37 So.2d 276 (1948); *Tapley* v. *Liberty Super Markets of Birmingham*, 53 Ala.App. 363, 300 So.2d 401 (1974), and *Robertson*, supra.

[10] In criminal contempt proceedings, the pleading need not be stated with the particularity required in a true criminal case. *People* v. *Barasch*, 21 Ill.2d 407, 173 N.E.2d 417 (1961). While this is true,

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action . . ." *Mullane*, supra, 339 U.S. at 314, 70 S.Ct. at 657.

Some degree of specificity is clearly required to enable an accused to adequately prepare a defense.

Moody contends that the allegations and accusations contained in the notices were inadequate. Oral argument on this point, however, was limited to the third charge (refusal to obey the April 30, 1975, order).

[11] The petition and the order to show cause, as regards the third charge, merely refer to "disobedience and failure to comply with" the order of April 30, 1975. As stated, that order contained eight separate requirements

for Moody to purge himself. Nowhere is there stated which of these requirements Moody failed to meet. Therefore, the show cause order was too general to apprise Moody of the conduct for which he was to be held in contempt. For this reason, the trial Court was in error in holding Moody in contempt on the third charge.

[12] The other three charges likewise contained general averments. In each of these cases, however, one primary act was required. They do not fail for indefiniteness because Moody was sufficiently apprised of which actions he must defend against.

III.

[13] Moody contends that, because he was not personally present at the hearing, the contempt convictions are void. This contention is premised upon Petitioner's interpretation of such proceedings as being strictly criminal in nature. As stated, however, these proceedings are, instead, *sui generis*.

While no Alabama case has specifically addressed the issue whether an alleged contemnor may be tried *in absentia*, the United States Supreme Court has held that there is no requirement that the accused, in a criminal contempt proceeding, be personally present. *Blackmer*, supra. In this case, Moody was not denied the right to be present. Instead, every opportunity to be present was afforded the accused. The order of September 10, 1976, expressly stated that Moody would not be compelled to attend, but that, if he so elected, he would be given a chance to testify and explain the charges against him. Furthermore, in recognition of possible physical infirmities, the trial Court stated that Moody could be given daily transcripts of the proceedings and allowed to give his testimony by way of deposition. This is clearly a case where Moody had

the right to be present, but waived that right by his actions. See *Haynes* v. *State*, 40 Ala.App. 106, 109 So.2d 738 (1958).

IV.

Moody contends that criminal contempt is a "public offense." Therefore, he asserts, because it is not a felony, it must be a misdemeanor, as defined in Tit. 1, § 7, Code. By this section, "Misdemeanor" is defined as "all other public offenses" which are not felonies. Upon this premise, he contends that the one-year statute of limitations for misdemeanors is applicable. Tit. 15, § 222, Code.

This contention ignores recent case authority which specifically states that criminal contempt is not a "public offense." *International Brotherhood of Electrical Workers* v. *Davis Constructors and Engineers, Inc.*, 334 So.2d 892 (Ala.1976).

It has been stated that:

> ". . . the circumstances [of] each case should be carefully examined to determine when lapse of time would make it unjust or unfair to compel a respondent to answer contempt charges." *Barasch*, supra, 173 N.E.2d at 420.

[14] The appropriate time limitation for bringing a criminal contempt charge must be determined on a case by case basis by determining the nature of the act or acts, the prejudice the delay may cause the accused and whether the delay is unreasonable. This theory complies with the balancing between the authority of the Court and the rights of the accused.

[15] Applying this test, we hold that the first charge is due to be reversed. Empire's receivership was ordered on June 29, 1972. The *Allmon* case was filed on November

22, 1974. While this, in itself, would not warrant reversal, the fact that the criminal contempt petition was not filed until August 19, 1976, almost two years after the act occurred, is unfair and prejudicial to Moody. Witnesses and other evidence could easily have become unavailable in this interim.

[16] The other two charges (the second and fourth) do not fail for this reason. The fourth case concerns acts within one month prior to the petition. The second case concerns continuing acts which clearly extend any limitation period and the accused cannot be heard to complain of prejudice from such situations.

V.

[17] Petitioner's contention that Judge Barber abused his discretion by not recusing himself is without merit. At the hearing on the show cause order, counsel for Moody moved that Judge Barber recuse himself on the grounds of several statements made at a hearing on July 19, 1976. At this hearing, Moody sought a continuance based on his poor health. A review of Judge Barber's statements indicates little more than that he felt he had been fair with Moody, but that Moody had not been fair with the Court, and that he was growing impatient with Moody's failure to cooperate.

When bias and prejudice are the stated grounds for recusal, the general rule is:

> " 'It is actual existence of prejudice on the part of a judge, not the mere apprehension of it by a party which disqualifies. Further, the disqualifying prejudice of a judge does not necessarily comprehend every bias, partiality, or prejudice which he may entertain with reference to the case, but must be of a

> character calculated to impair seriously his impartiality and sway his judgment, and must be strong enough to overthrow the presumption of his integrity . . .' " *Duncan* v. *Sherrill*, 341 So.2d 946, 947 (Ala. 1977).

Judge Barber's statements do not amount to a showing of bias and prejudice necessary to compel recusal. Furthermore, upon a review of the entire record, we think Judge Barber is to be commended for the patience displayed in light of Moody's consistently recalcitrant behavior.

VI.

[18, 19] Petitioner further contends that the trial Court abused its discretion in not granting a continuance because of Moody's poor health. It is settled law that the appropriateness of a continuance is within the sound discretion of the trial Court. *Mobile Cab & Baggage Co., Inc.* v. *Busby*, 277 Ala. 292, 169 So.2d 314 (1964). A continuance is not favored in the law and the trial Court's discretion will not be reversed absent a showing of gross abuse. *Johnson Publishing Co., Inc.* v. *Davis*, 271 Ala. 474, 124 So.2d 441 (1960); and *World Homes, Inc.* v. *Wilson*, 54 Ala.App. 47, 304 So.2d 603 (1974).

[20] The Court below granted a conditional continuance, subject to a physical examination of Moody. Furthermore, the Court permitted Moody to testify by deposition if he so desired. The Court did all within its power to recognize Moody's infirmities, while at the same time, expeditiously proceeding with an important controversy. For these reasons, the contention that the trial Court abused its discretion in not granting the continuance is without merit.

VII.

[21] In addition to the statutory punishment of fifty dollars and five days in jail, the trial Court ordered Moody to pay reasonable attorney's fees to Protective for expenses incurred in the preparation and prosecution of the contempt proceedings. In so doing, the trial Court exceeded its authority.

[22] Generally, attorney's fees are recoverable only where authorized by statute, when provided in a contract or in an equitable proceeding where the efforts of an attorney creates a fund out of which fees may be paid. *State* v. *Alabama Public Service Commission*, 293 Ala. 553, 307 So.2d 521 (1975); *Hartford Accident & Indemnity Co.* v. *Cosby*, 277 Ala. 596, 173 So.2d 585 (1965), and *Taylor* v. *White*, 237 Ala. 630, 188 So. 232 (1939). There is no applicable statute before us. Also, the benefit received in criminal contempt proceedings inures to the Court and the State, and only incidentally to a suitor.

[23] Moody's contention that the ordering of attorney's fees renders the entire judgment void, however, is misplaced. He relies upon *City of Birmingham* v. *Perry*, 41 Ala.App. 173, 125 So.2d 279 (1960), wherein it was held that, when a court exceeds its jurisdiction in assessing punishment in a contempt proceeding, the judgment is void. In that case, the trial Court ordered the contemnor to hard labor. This clearly exceeds the punishment allowed for contempt convictions. Tit. 13, §§ 9, 143, Code.

Here, however, the award of attorney's fees is not, strictly speaking, punishment. Also, such punishment was different in degree, whereas in this case, it was different in kind. The award of attorney's fees has been allowed in other states. In such situations, however, the amount may not exceed the statutory penalty. *O'Rouke* v. *Cleve-*

land, 49 N.J.Eq. 577, 25 A. 367 (1892). See also 17 C.J.S. *Contempt* § 97, p. 274.

Criminal contempt is not an equity or civil action. As stated, it is *sui generis*. Therefore, the award of attorney's fees is not proper. It must be considered as mere surplusage and severed from the judgment decree.

VIII.

[24] The second case of contempt is based on Moody's complicity in the filing of the amendment in *Allmon*. This also was the basis of civil contempt charges. Moody cannot be heard to complain that the basis of the criminal contempt adjudication is also the basis of civil contempt. In brief, counsel for Moody stated:

> "Admittedly, assuming a violation of the January 6, 1975 order, this same conduct may be both a civil contempt and a criminal contempt."

Noting the distinction between civil and criminal contempt, the same acts may justify a court resorting to both coercive and punitive measures. *United States* v. *United Mine Workers of America*, 330 U.S. 258, 67 S.Ct. 677, 91 L.Ed. 884 (1947); *Ex parte Griffith*, 278 Ala. 344, 178 So.2d 169 (1965), and *Ex parte Abercrombie*, 277 Ala. 479, 172 So.2d 43 (1965).

XI.

Moody raises numerous objections to various items of documentary evidence and to certain statements which he contends are hearsay. Under the view taken that Petitioner can only be held in contempt for violation of the January 6, 1975, injunction, and for his refusal to appear in court, as ordered, on July 19, 1976, (cases two and four) we believe that the evidentiary issues are moot.

Conclusion

As has been shown, criminal contempt is a *sui generis* proceeding. Because it partakes of a criminal nature, however, a balance must be struck between the rights of the accused and the power of a Court to uphold its authority and dignity.

Utilizing this test, we hold the first charge of contempt must fail for lack of timeliness. Also, the third charge must be reversed for lack of specificity of the charge. As to each of the second and fourth charges, however, the sufficiency of notice, and the timeliness and specificty of each charge under all the circumstances, was appropriate; and the evidence was more than sufficient.

For the reasons stated above, the convictions of criminal contempt as to charges two and four are affirmed and the convictions of criminal contempt as to charges one and three are reversed.

AFFIRMED IN PART; REVERSED AND RENDERED IN PART.

TORBERT, C. J., and FAULKNER, SHORES and EMBRY, JJ., concur.

BLOODWORTH, MADDOX, ALMON and BEATTY, JJ., concur in part and dissent in part.

BLOODWORTH, Justice (concurring in part and dissenting in part).

I concur in all of Mr. Justice Jones' opinion for the majority except as to that part of Part II in which he finds the trial court to be in error for holding Moody in contempt on the third charge. He reasons that the show cause order was too general to apprise Moody of his alleged contumacious conduct.

I dissent from that part of the holding because I find the third show cause order clearly called upon Moody to show cause why he "should not be adjudged in criminal contempt . . . because of his disobedience and failure to comply with the provisions of the Order . . . of April 30, 1975." A copy of the April 30, 1975, order accompanied the show cause order. Thus, there could have been no doubt, as far as Moody was concerned, that he was charged with disobeying and failing to comply with all "the provisions of the order." Surely, it would be an overly technical interpretation to insist that by not using the word "all" Moody wasn't apprised as to which one of the eight requirements he failed to meet.

As stated in our case of *Hunter* v. *State,* 251 Ala. 11, 37 So.2d 276 (1948), with respect to the need for a written accusation in these cases, viz.:

> " 'This does not mean that a written accusation is not essential. But it need not be verified except to support a warrant of arrest under § 5, supra. But *the form of it is not material if it sets out the charges in such manner as to apprise him of the exact nature of it, and what he is called upon to defend.*' (Emphasis supplied.)"

MADDOX and BEATTY, JJ., concur.

ALMON, Justice (concurring in part and dissenting in part):

I concur in the opinion of Mr. Justice Jones except that part which holds that the first charge must be reversed for laches.

The primary case out of which the contempt arose was active and had not been finally concluded. Addition-

ally, there was no showing of prejudice occasioned by the delay.

BEATTY, Justice (concurring in part and dissenting in part):

I concur with the opinion of Mr. Justice Jones except in two aspects: that part of his opinion which holds that the first charge of contempt must be reversed for laches, and that part dealing with notice to Mr. Moody of his contemptuous conduct.

While I agree that the circumstances of each case will determine the effect of lapse of time on the contempt charge, there is no proof here that the alleged contemnor was prejudiced by any delay in bringing the first charge or that the delay in bringing it was unreasonable. Moody had an ample opportunity to introduce evidence of prejudicial delay and simply failed to introduce any such evidence. Under those circumstances, I believe the trial court is entitled to the presumption of correctness in his ruling.

In connection with whether or not the trial court gave the proper notice of the contempt charge to Moody, I wish to align myself with the opinion of Mr. Justice Bloodworth.

MADDOX, J., concurs.

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OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

Re: SC 2336, SC 2337, SC 2338, SC 2339

EX PARTE: SHEARN MOODY, JR., PETITIONER

PETITION FOR WRIT OF CERTIORARI

(IN RE: CRIMINAL CONTEMPT PROSECUTIONS AGAINST SHEARN MOODY, JR.)

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

..... Appeal docketed. Future correspondence should refer to the above SC number.

..... Court Reporter granted additional time to file reporter's transcript to and including

..... Clerk/Register granted additional time to file clerk's record/record on appeal to and including

..... Appell..... granted 7 additional days to file briefs to and including

..... Appellant(s) granted 7 additional days to file reply briefs to and including

..... Record on Appeal filed

..... Appendix Filed

..... Submitted on Briefs

..... Petition for Writ of Certiorari denied. No opinion.

XXX Application for rehearing overruled. No opinion written on rehearing.

..... Permission to file amicus curiae briefs granted

/s/ J. O. Sentell
Clerk, Supreme Court of Alabama

9-30-77

SUPREME COURT OF THE UNITED STATES

No. A-517

EX PARTE: SHEARN MOODY, JR.,
Petitioner

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 24, 1978.

/s/ Lewis F. Powell, Jr.
Associate Justice of the Supreme Court of the United States

Dated this 16th day of December, 1977.

IN THE CIRCUIT COURT FOR THE
TENTH JUDICIAL CIRCUIT OF ALABAMA
EQUITY DIVISION

CIVIL ACTION NO. 171-687

STATE OF ALABAMA, EX REL. JOHN G. BOOKOUT,
COMMISSIONER OF INSURANCE,
Plaintiff,

vs.

EMPIRE LIFE INSURANCE COMPANY OF AMERICA,
AN ALABAMA CORPORATION,
Defendant,

SHEARN MOODY, JR.,
Intervenor.

ORDER TO SHOW CAUSE

(Filed August 19, 1976)

Upon the annexed motion and the exhibits thereto attached and upon all the proceedings had herein, it is

ORDERED that Shearn Moody, Jr. appear in person and show cause at a motion term of this Court, to be held in Room 223, Jefferson County Courthouse, 710 North 21st Street in the City of Birmingham, Alabama, at 2:00 o'clock P.M. on the 3rd day of September, 1976, or as soon thereafter as counsel can be heard, why the said Shearn Moody, Jr. should not be adjudged in criminal contempt of this Court because of his disobedience of the Order of this Court of June 16, 1976.

DONE this 19th day of August, 1976.

Service of a copy of this order to show cause, together with the papers upon which it is based, upon Shearn Moody, Jr. on or before the 26th day of August, 1976, by United States mail, shall be deemed sufficient.

/s/ W. C. Barber
Circuit Judge in Equity
Sitting

IN THE
CIRCUIT COURT FOR THE TENTH
JUDICIAL CIRCUIT
OF ALABAMA
EQUITY DIVISION

CIVIL ACTION NO. 171-687

STATE OF ALABAMA, EX REL. JOHN G. BOOKOUT,
COMMISSIONER OF INSURANCE,
Plaintiff,

vs.

EMPIRE LIFE INSURANCE COMPANY OF AMERICA,
AN ALABAMA CORPORATION,
Defendant,

SHEARN MOODY, JR.,
Intervenor.

ORDER TO SHOW CAUSE

(Filed August 19, 1976)

Upon the annexed motion and the exhibits thereto attached and upon all the proceedings had herein, it is

ORDERED that Shearn Moody, Jr. appear in person and show cause at a motion term of this Court, to be held in Room 223, Jefferson County Courthouse, 710 North 21st Street in the City of Birmingham, Alabama, at 1:30 o'clock P.M. on the 2nd day of September, 1976, or as soon thereafter as counsel can be heard, why the said Shearn Moody, Jr. should not be adjudged in criminal contempt of this Court because of his disobedience of the Order and Injunction of this Court of January 6, 1975.

DONE this 19th day of August, 1976.

Service of a copy of this order to show cause, together with the papers upon which it is based, upon Shearn Moody, Jr. on or before the 26th day of August, 1976, by United States mail, shall be deemed sufficient.

/s/ W. C. Barber
Circuit Judge in Equity
Sitting

IN THE
CIRCUIT COURT OF JEFFERSON COUNTY
EQUITY DIVISION

CIVIL ACTION NO. 171-687

STATE OF ALABAMA, EX REL. JOHN G. BOOKOUT,
COMMISSIONER OF INSURANCE,
Plaintiff,

vs.

EMPIRE LIFE INSURANCE COMPANY OF AMERICA,
an Alabama corporation,
Defendant,

and

SHEARN MOODY, JR.,
Intervenor.

CRIMINAL CONTEMPT JUDGMENTS

(Filed November 1, 1976)

The consolidated criminal contempt proceedings against Shearn Moody, Jr., a party before this Court, came on for final hearing on September 13, 1976. The proceedings were initiated by "Petition for Issuance of Orders to Show Cause and for Contempt Judgments Against Shearn Moody, Jr.," which petition was filed on August 19, 1976 by Protective Life Insurance Company. After carefully considering the petition and supporting papers, this Court issued four orders commanding Shearn Moody, Jr. to appear before this Court at hearings scheduled for September 2 and September 3, 1976 and then and there show cause why he should not be held in criminal contempt of this Court on four separate charges specified in the show-

cause orders and the petition and supporting papers on which said orders were based.

The petition shows on its face that it was served upon each of three attorneys of record for Moody; in addition, the show-cause orders provided for service of the same, together with all papers upon which they were based, upon Shearn Moody, Jr. The Court directed that the orders, petition and supporting papers, be served upon Moody at his Galveston, Texas addresses, both by registered and regular mail, properly addressed and forwarded to him by this Court. Neither Moody nor any of his attorneys has denied timely receipt of the show-cause orders and supporting papers.

The show-cause orders were issued because it was considered both necessary and proper to inquire into whether certain orders and decrees of the Court identified in the respective show-cause orders[1] had been disobeyed or resisted by Moody, a party to the on-going receivership proceedings of Empire Life Insurance Company of America ("Empire"), which action is still pending before the Court. The show-cause orders were issued pursuant to statutory authority, and the Court's inherent power and duty to determine whether disobedience or resistance to its lawful orders and decrees has occurred and, after such determination, to adjudge the person or party offending guilty of contempt, if that be the case, and to punish him accordingly. The Court relies specifically on its power to punish as contempt

> "[T]he disobedience or resistance of any officer of the court, *party*, juror, witness, or any other person, to any lawful writ, process, *order*, rule, *decree*, or command thereof.
>
> Deceit, or the abuse of the process of the proceedings of the court, by any person or party, *or any unlawful interference with the process or proceedings of the court.*"

ALA. CODE tit. 13, § 2 (1958) (emphasis supplied). Jurisdiction unquestionably exists pursuant to the foregoing statutory authority, together with Sections 3; 126(4); and 143; of Title 13 of the *Code of Alabama*.

Procedural Background[2]

Moody's response to the show-cause orders was to seek a continuance. On August 30, 1976, local counsel for Moody presented to the Court a motion seeking continuance of the criminal-contempt hearings, reciting (1) that Moody was hospitalized in Galveston, Texas and unable to travel to Alabama; and (2) that specific information as to Moody's physical condition, by way of an affidavit to be submitted by Moody's physician, Dr. Vogelpohl, would be forthcoming. At the request of Moody's counsel,

1. The four show-cause orders are concerned with the following four orders and decrees of this Court, respectively: The Order entered June 29, 1972, which put Empire into receivership and appointed the Commissioner of Insurance of the State of Alabama as Receiver; the Order and Injunction entered January 6, 1975, which expressly enjoined Moody from interfering with the Empire receivership proceedings by way of suit, without the prior approval of the Court; the Order entered April 30, 1975, which commanded Moody to undertake detailed, specific actions in order to purge himself of civil contempt of this Court; and the Order entered June 16, 1976, which commanded Moody to appear in person before the Court on July 19, 1976 to demonstrate his compliance with the April 30 Order and that he had purged himself of civil contempt.

2. The Court included in its Memorandum Opinion of October 19, 1976, that was entered in the ancillary proceedings for damages against Moody, an extensive discussion of background and history, which, though not directly material to the criminal-contempt proceedings at hand, is helpful to put the procedural sequence in context.

the hearing on the motion for continuance was set for September 1, 1976.

On August 31, 1976, upon receipt of the letter from Moody's physician, the Court determined, on motion by Protective and without objection from Moody's counsel, that Moody should submit to a physical examination.[3]

Moody's motion for a continuance of the criminal-contempt proceedings came before the Court on September 1, 1976. After hearing argument of counsel, the Court determined that a general continuance was not warranted. Said determination was based upon representations made to the Court as to Moody's physical condition and counsel for Moody's inability to inform the Court as to when, if ever, Moody would voluntarily present himself for said hearings. However, the Court granted a conditional continuance of the hearings, on a day-to-day basis. The Court specified the conditions under which the continuance was granted in its order of September 1, 1976, namely that Dr. Vogelpohl submit to oral deposition the following day in Galveston, Texas, at a time convenient to the Doctor, and that Dr. Vogelpohl agree to the physical examination of Moody by Dr. Middleton.

Moody permitted Dr. Middleton to conduct the physical examination, but Moody's physician did not agree to

3. The examination of Moody was to be conducted by Dr. John W. Middleton, Clinical Professor, Department of Internal Medicine, University of Texas. The order of August 31, 1976 also required Moody to file reports of each and every examination previously made relating to the physical conditions upon which the continuance of the criminal-contempt hearings was sought. The order also required Moody to file with the Court and serve upon counsel of record all medical and hospital records of Moody. Though Moody submitted to the Court-ordered examination by Dr. Middleton, he failed to file any medical or hospital records or reports. No explanation of such failures to comply with the August 31, 1976 order has yet been offered by Moody or on his behalf.

submit to deposition. Accordingly, by order entered September 10, 1976, after consideration of the report filed by Dr. Middleton, the Court ordered consolidation of the hearings on the four show-cause orders and that the consolidated criminal-contempt hearing would commence on September 13, 1976. Because counsel for Moody have repeatedly represented to the Court their inability to specify any date certain on which Moody would appear to answer the charges of criminal contempt, and in order to dispel any suggestion that the undersigned would insist on a courtroom appearance by Moody that might present some risk to his health, the Court determined not to compel Moody to attend the contempt proceedings on September 13, 1976. Rather, the order of September 10, 1976 left the decision of whether to attend in person to Moody and provided Moody the additional option of answering the charges of criminal contempt by way of oral deposition to be taken in the offices of his counsel, in accordance with the provisions of the Alabama Rules of Civil Procedure, after Moody had had an opportunity to review the daily transcript of the criminal-contempt proceedings. The September 10 Order further provided that Moody's deposition testimony, should he elect to provide the same, would be considered as evidence in the contempt proceedings.

Hearing On Criminal Contempt Charges

The hearing on September 13, 1976 commenced as scheduled. Moody elected not to appear.[4] He was, however, represented by three attorneys who were permitted

4. It has been conclusively established by the United States Supreme Court that in proceedings to punish for contempt, the presence, in court, of the alleged contemnor is not required. *Blackmer* v. *United States*, 284 U.S. 421, 76 L.Ed. 375 (1932). It is sufficient that there be provided suitable notice and an opportunity to be heard on the contempt charges. *Id.*

to participate in the proceedings as fully as they desired. The transcript of the proceedings was duly prepared and filed by the Court Reporter. However, to this date no deposition of Moody, nor any other sworn testimony of Moody in explanation of or in answer to the contempt charges against him has been filed with the Court.

Accordingly, the evidence in the criminal-contempt proceedings being closed, and the Court having carefully considered the petition and supporting papers, voluminous documentary evidence, oral testimony of witnesses, and argument of counsel, the Court is of the opinion that the evidence is compelling that Moody had notice and actual knowledge of the character of the criminal contempt charges against him and was provided ample opportunity and time to prepare his defense and to answer such charges. The evidence is equally compelling that Moody is guilty of criminal contempt on each of the four charges. It is the opinion of this Court that Moody's actions offend the dignity and authority of the Court and have obstructed and impeded the administration of justice in the Empire receivership proceedings.

It is, therefore, ORDERED, ADJUDGED and DECREED as follows:

One: Shearn Moody, Jr. is in criminal contempt of this Court for having wilfully and flagrantly resisted and disobeyed the order of this Court entered June 29, 1972, which put Empire Life Insurance Company of America ("Empire") into receivership and appointed the Commissioner of Insurance of this State as Receiver of Empire. Moody's active participation, assistance in, and control of the filing of the *Allmon* lawsuit[5] against the Receiver

5. *Willie Allmon, etc.* v. *John G. Bookout, et al.*, Civil Action No. 74-377-N (United States District Court for the Middle District of Alabama) [hereinafter *Allmon* case].

appointed by this Court, without seeking approval of this Court, is tantamount to and caused patent interference with the Receiver, the receivership proceedings, and the receivership estate, and is punishable under the established law of Alabama as contempt of Court.[6] Pursuant to Title 13, Section 9 of the *Code of Alabama,* Moody is hereby sentenced to imprisonment in the Jefferson County, Alabama Jail for five (5) days and ordered to pay to the Register of this Court forthwith a fine in the amount of Fifty and No/100 Dollars ($50.00).

Two: Shearn Moody, Jr. is in criminal contempt of this Court for having wilfully and flagrantly disobeyed and resisted the Order and Injunction of January 6, 1975, which expressly enjoined Moody from interfering with the receivership proceedings, *inter alia,* by filing, financing, sponsoring, or aiding, in whole or in part, in the filing of any amendment to any complaint or legal claim in any court on behalf of any party against the Receiver or other persons identified in said Injunction, without the prior approval of this Court. Moody's filing, financing, sponsoring, and aiding in the filing of an amended complaint in the *Allmon* action, without seeking or obtaining prior approval of this Court, amounts to a raw violation of the January 6 injunction and is punishable under the

6. ALA. CODE tit. 13, § 2. The Supreme Court of Alabama is firmly committed to the principle that a person who desires to bring suit against a receiver in his official capacity must first obtain leave of the court by which the receiver was appointed. The principle is established for the protection of receivers against unnecessary and expensive litigation; the institution of such an action against a receiver without first obtaining leave of the appointing court constitutes contempt of court. *Ex parte Davis,* 230 Ala. 668, 162 So. 306 (1935), cited and quoted with approval in *Shearn Moody, Jr.* v. *State of Alabama ex rel. Payne,* ..... Ala. ..... , 329 So. 2d 73, 78 (1976). The *Davis* principle is indeed well established. *See* 66 Am.Jur.2d, *Receivers* § 171 at 994; 75 C.J.S., *Receivers* § 333b at 1008; 2 *Clark on Receivers* § 625.1, at 1024 (3d Ed. 1959). *See also* 65 Am.Jur.2d, *Receivers* § 168 at 992; 75 C.J.S., *Receivers* § 122 at 761.

established law of this State as contempt of Court.[7] Pursuant to Title 13, Section 9 of the *Code of Alabama,* Moody is hereby sentenced to imprisonment in the Jefferson County, Alabama Jail for five (5) days and ordered to pay to the Register of this Court forthwith a fine in the amount of Fifty and No/100 Dollars ($50.00).

Three: Shearn Moody, Jr. is in criminal contempt of this Court for having wilfully and flagrantly disobeyed and resisted the Order of this Court of April 30, 1975, which order detailed specific actions required of Moody in order to purge himself of civil contempt of this Court. Moody's having continued, by and through his attorneys and agents, his sponsorship and control over the *Allmon* action after April 30, 1975, amounts to flagrant disobedience of the Order of this Court of April 30, 1975 and is punishable under the established law of this State as contempt of Court.[8] Pursuant to Title 13, Section 9 of the *Code of Alabama,* Moody is hereby sentenced to imprisonment in the Jefferson County, Alabama Jail for five (5) days and ordered to pay to the Register of this Court forthwith a fine in the amount of Fifty and No/100 Dollars ($50.00).

Four: Shearn Moody, Jr. is in criminal contempt of this Court for having wilfully disobeyed and resisted the Order of this Court of June 16, 1976, which Order commanded Moody to appear in person before the Court on July 19, 1976. Moody's wilful and flagrant disobedience

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7. ALA CODE tit. 13, § 2. Moody challenged the injunction on appeal to the Supreme Court of Alabama. *Moody* v. *State ex rel. Payne,* ... Ala. ....., 329 So. 2d 73 (1976). The Supreme Court held that the injunction was expressly authorized by *Ala. Code* tit. 28A, § 624(2) and was supported by undisputed evidence. 329 So. 2d at 78. Moreover, the Supreme Court expressly recognized that the *Allmon* case had been "solicited by Moody's agents" and that the named plaintiff "was merely an unwitting front for Moody." 329 So. 2d at 76 & 81.

8. ALA CODE tit. 13, § 2 (1958).

of the Order of June 16, 1976 is punishable under the established law of this State as contempt of Court.[9] Pursuant to Title 13, Section 9 of the *Code of Alabama,* Moody is hereby sentenced to imprisonment in the Jefferson County, Alabama Jail for five (5) days and ordered to pay to the Register of this Court forthwith a fine in the amount of Fifty and No/100 Dollars ($50.00).

Five: Shearn Moody, Jr. is hereby ordered to surrender himself forthwith to the Sheriff of Jefferson County, Alabama or one of his authorized deputies. The sentences herein imposed shall run consecutively.

Six: The costs of the criminal-contempt proceedings, including costs and expenses incurred in connection with the Court-ordered physical examination of Moody on September 2, 1976, are hereby taxed against Shearn Moody, Jr.

Seven: Counsel for Protective is entitled to recover and Moody is hereby ordered to pay reasonable attorneys' fees attributable to preparation for and prosecution of the criminal-contempt proceedings. The amount of such attorneys' fees to be awarded shall be determined by the Court at the hearing presently scheduled for determination of the amount of the default judgment entered against Moody in the ancillary proceedings herein.

DONE this 1st day of November, 1976.

/s/ W. C. Barber
Circuit Judge

---

9. *Id.*

IN THE
CIRCUIT COURT FOR THE TENTH
JUDICIAL CIRCUIT
OF ALABAMA
IN EQUITY

CASE NO. 171-687

STATE OF ALABAMA, EX REL. JOHN G. BOOKOUT,
COMMISSIONER OF INSURANCE,
Complainant,

vs.

EMPIRE LIFE INSURANCE COMPANY OF AMERICA,
AN ALABAMA CORPORATION,

DECREE FOR INJUNCTION AND APPOINTMENT OF RECEIVER

(Filed June 29, 1972)

This cause being submitted to the Court upon the duly verified Complaint, as amended, seeking an injunction and the appointment of a Receiver, and upon consideration thereof and of the evidence offered in support thereof and testimony taken in open Court, the Court is of the opinion and finds that the Respondent is impaired and insolvent and that the Complainant is entitled to the relief prayed for in the Bill of Complaint, as amended.

It is therefore, ORDERED, ADJUDGED AND DECREED by the Court as follows:

1. That the Respondent, its agents, servants, employees, attorneys and all officers thereof and all persons in active concert or participation with Respondent be and they are hereby restrained and enjoined from conducting

any further business of Respondent except as as hereinafter provided pending further orders of this Court or exercising any control whatsoever over said business or its assets pending further orders of this Court.

2. That John G. Bookout, Commissioner of Insurance, be appointed Receiver of all the property, assets and estate of said Empire Life Insurance Company of America and directed to take immediate possession of said property, including the premises and all rights of action, as well as the books, papers, evidence of debt and all other property of every kind whatsoever belonging to the said company, including but not limited to all stocks, bonds, debentures, mortgages, furniture, fixtures and office supplies.

3. That the said Receiver continue to operate the business of the said Empire Life Insurance Company of America to the end of rehabilitating said company under the further orders and directions of the Court, and that he proceed to collect any and all debts due to the said company.

4. That the Receiver be and is hereby authorized to apply to the Court for further instructions in the discharge of his duties as such Receiver.

5. That the Receiver shall have authority to negotiate sales of property or other assets, but if he shall receive an offer therefor before making a private sale the Receiver shall report the terms of such offer to the Court for such action as to the Court may seem meet and proper.

6. That the Receiver is authorized and directed to hire legal, clerical, managerial and other employees necessary to carry on the business and is also authorized to rent or lease office facilities and to pay reasonable and necessary expenses and salaries incidental thereto.

7. That the said John G. Bookout is hereby vested with all the power and authority and is subject to the responsibility given to the Commissioner of Insurance as a domiciliary Rèceiver in Section 634 and other pertinent sections of the Alabama Insurance Code, Act No. 407, Acts of Alabama 1971.

8. The court reserves jurisdiction of this cause for such other Orders on the premises and matters pertaining to this particular Order as it may find necessary, appropriate or desirable to make from time to time and reserves jurisdiction generally of this cause.

DONE AND ORDERED, at Birmingham, Alabama this 29th day of June, 1972.

/s/ W. C. Barber
Circuit Judge in Equity

IN THE
CIRCUIT COURT OF JEFFERSON COUNTY
EQUITY DIVISION

CIVIL ACTION NO. 171-687

STATE OF ALABAMA, EX REL. JOHN G. BOOKOUT,
COMMISSIONER OF INSURANCE,
PLAINTIFF,
VS.
EMPIRE LIFE INSURANCE COMPANY OF AMERICA,
an Alabama corporation,
DEFENDANT,
and
SHEARN MOODY, JR.,
INTERVENOR.

ORDER AND INJUNCTION

(Filed January 6, 1975)

This matter was heard this 6th day of January, 1975 on the application of John G. Bookout, as Receiver of Empire Life Insurance Company of America, for an injunction against Shearn Moody, Jr. and others, a temporary restraining order having been previously issued on said application on December 27, 1974. On the basis of evidence adduced at said hearing, this Court is convinced that a permanent injunctive order should be entered as follows pursuant to this Court's general equity authority and the specific statutory authority contained in Title 28A, §624, Code of Alabama 1940, as amended:

It is ORDERED, ADJUDGED and DECREED that

(1) any and all policyholders, stockholders and agents, present or former, of Empire Life Insurance Company of America, and

(2) Shearn Moody, Jr., his officers, agents, servants, employees and attorneys (including, but without limitation, Donald L. Collins, A. Eric Johnston, Dale R. Major, Scott E. Manley, A. R. Schwartz, and Thomas R. Beech),

and those persons in active concert or participation with any of the foregoing be permanently restrained and enjoined from filing, financing, sponsoring, initiating, or aiding, in whole or in part, in any way the filing of any lawsuit, complaint or legal claim, or any amendment to any complaint or legal claim in any court wheresoever located on behalf of any party whatsoever against:

(1) John G. Bookout, as an individual;

(2) John G. Bookout as Receiver of Empire Life Insurance Company of America, his officers, agents, employees and attorneys;

(3) the Ancillary Receivers of Empire Life Insurance Company of America, their officers, agents, employees and attorneys;

(4) Protective Life Insurance Company, its officers, agents, employees and attorneys; or

(5) any other person or legal entity

which lawsuit or claim relates to or affects directly or indirectly:

(a) the affairs of Empire Life Insurance Company of America;

(b) its receivership;

(c) its Receiver;

(d) the Treaty of Assumption and Bulk Reinsurance, as amended, between the Receiver and Protective Life Insurance Company; or

(e) the implementation of any order or decree of this Court in this proceeding,

unless such policyholders, stockholders or agents or said Shearn Moody, Jr., his officers, agents, servants, employees and attorneys and those persons in active concert or participation with them shall first receive the prior approval of this Court.

DONE this 6th day of January, 1975.

/s/ W. C. Barber
Circuit Judge

Supreme Court, U. S.
FILED
MAR 22 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1041

EX PARTE: SHEARN MOODY, JR.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1041

EX PARTE: SHEARN MOODY, JR.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

INTRODUCTION

The Petition before this Court is the fifth in a series of petitions for a writ of certiorari filed in this Court by Shearn Moody, Jr. relating to the domicillary and ancillary receivership proceedings in the courts of Alabama and Texas involving Empire Life Insurance Company of America ("Empire"). Petitioner ("Moody") was the chief executive officer of Empire, an insolvent Alabama insurance company. Respondent is Protective Life Insurance ("Protective"), an Alabama insurance company that reinsured Empire's policies.

Moody's efforts to nullify the liquidation of Empire and the reinsurance of its insurance policies by Protective have produced

a virtually never-ending stream of litigation. His efforts have been uniformly unsuccessful. This Court has, to date, denied three of Moody's petitions for a writ of certiorari.[1] In addition to the Petition now before this Court, Moody has pending two other petitions for a writ of certiorari relating to Empire.[2] Citations of some of the reported decisions in this litigation are listed below:

Moody v. State ex rel. Payne, 12 Ala. Bar Rptr. 646, — So. 2d — (S. Ct. Ala. Feb. 3, 1978);

Moody v. State ex rel. Payne, 351 So. 2d 552 (S. Ct. Ala. Sept. 9, 1977);

Moody v. State ex rel. Payne, 351 So. 2d 547 (S. Ct. Ala. Sept. 9, 1977);

Ex parte Shearn Moody, Jr., 351 So. 2d 538 (S. Ct. Ala. Aug. 19, 1977);

Moody v. State ex rel. Payne, 295 Ala. 299, 329 So. 2d 73 (1976);

Moody v. State, ex rel. Payne, 344 So. 2d 160 (1977);

Moody v. State, 520 S.W.2d 452 (Tex. Civ. App.—Austin 1975);

Empire Life Ins. Co. v. State, 492 S.W.2d 366 (Tex. Civ. App.—Austin 1973);

Moody v. Crook, 520 S.W.2d 958 (Tex. Civ. App.—Austin 1975);

[1] Petitions have been denied in: *Ex parte Shearn Moody, Jr.*, No. 76-1845, *cert. denied* 10/3/77, *reh. denied* 11/28/77; *Shearn Moody, Jr. v. Texas*, No. 77-571, *cert. denied* 12/5/77, *reh. denied* 1/16/78; *Shearn Moody, Jr. v. State of Alabama ex rel. Payne*, No. 77-428, *cert. denied* 12/12/77.

[2] *Shearn Moody, Jr., et al. v. Texas*, No. 77-873 (Pet. filed Dec. 16, 1977); *Shearn Moody, Jr. v. State of Alabama, ex rel. Payne*, No. 77-1109 (Pet. filed Feb. 7, 1978).

Moody v. Jones, 519 S.W.2d 536 (Tex. Civ. App.—Austin 1975);

Day v. State, 489 S.W.2d 368 (Tex. Civ. App.—Austin 1972, n.r.e.*);

Moody v. Moody Nat'l Bank, 522 S.W.2d 710 (Tex. Civ. App.—Houston 1975, n.r.e.);

Moody v. Texas, 538 S.W.2d 158 (Tex. Civ. App.—Waco 1976, writ ref'd n.r.e. 1977).

The Petition now before this Court seeks review of the decision of the Supreme Court of Alabama upholding two findings of criminal contempt against Moody by the Alabama receivership court.

A brief chronology of significant procedural developments in the Empire receivership proceedings before the Alabama courts provides the background for the criminal-contempt adjudications against Moody sought to be reviewed by the Petition now before this Court. Empire was placed in receivership by Order entered by the receivership court on June 29, 1972 (R. 35-38). Moody intervened in the receivership proceedings on October 12, 1973 (R. 39-48). On the petition of the Empire Receiver, the Commissioner of Insurance for the State of Alabama, the receivership court authorized the Receiver to advertise for and secure reinsurance for Empire. Moody objected to reinsurance and liquidation of Empire. Following a three-week trial, to which Moody and Protective were parties, on June 14, 1974 the receivership court authorized the Empire Receiver to accept a reinsurance proposal submitted by Protective. Moody perfected an appeal to the Supreme Court of Alabama. That court affirmed, *Moody v. State ex rel. Payne*, 344 So. 2d 160 (S. Ct. Ala. 1977). Moody petitioned this Court for a writ of cer-

* Indicates denial of review by the Texas Supreme Court upon a finding of "no reversible error" (n.r.e.).

tiorari, Case No. 77-428; the petition was denied by this Court on December 12, 1977. During the pendency of Moody's appeal to the Alabama Supreme Court from the receivership court's decree ordering liquidation and approving reinsurance with Protective, the Empire Receiver sought and secured an injunction from the receivership court prohibiting Moody from interfering with the Empire receivership proceedings. The injunction, which was entered January 6, 1975, enjoined Moody, *inter alia,* from filing—without the prior approval of the receivership court—any amendment in any pending action involving the receivership proceedings, the Receiver, or Protective. Moody appealed from the January 6, 1975 injunction to the Supreme Court of Alabama. *Moody v. State ex rel. Payne,* 295 Ala. 299, 329 So. 2d 73 (1976). That court affirmed, holding that "[t]he injunction was not only justified but was necessary to preserve the assets of Empire." 295 Ala. at 306, 329 So. 2d at 79. Moody did not seek review in this Court of the decision of the Alabama Supreme Court affirming the January 6, 1975 injunction. However, during the pendency of Moody's appeal from the injunction to the Alabama Supreme Court, an amended complaint was filed by Moody's lawyers in the case of *Allmon v. Bookout,*[3] which was then pending in the United States District Court for the Middle District of Alabama. The *Allmon* amended complaint sought a federal-court injunction prohibiting the liquidation of Empire and enjoining the consummation of the reinsurance agreement by the Empire Receiver and Protective; the *Allmon* amended complaint also sought that the federal court declare the state-court receivership proceeding "null and void" (R. 125-126). Immediately after the amended complaint in *Allmon* was filed, Protective instituted civil-contempt proceedings against Moody. By Order of April 30, 1975, Moody was adjudicated in civil contempt for having violated the January 6, 1975 injunction. Though Moody sought to have the civil-contempt adjudication vacated or stricken by the Alabama Supreme Court by extraordinary writ,[4] no ordinary appellate review was sought by Moody in the courts of Alabama. Moody sought indirectly to challenge the April 30, 1975 civil-contempt adjudication in this Court in case no. 76-1845; that petition for a writ of certiorari was denied by this Court on October 3, 1977. Shortly after the *Allmon* lawsuit was dismissed, the receivership court entered an Order, on June 16, 1976, which scheduled an evidentiary hearing to determine whether Moody had purged himself of civil contempt. The June 16, 1976 Order commanded Moody to appear in person at the evidentiary hearing on July 19, 1976. Moody failed to appear as ordered.

[3] *Allmon v. Bookout, et al.,* No. 74-377-N (M.D. Ala. 1974).

STATEMENT OF THE CASE

The criminal contempt proceedings against Moody were instituted on August 19, 1976 on a petition filed by Protective (R. 1-20). Each of three attorneys of record for Moody were served (R. 7). On the basis of the petition, the receivership court issued four orders requiring Moody to appear and show cause why he should not be held in criminal contempt (R. 21-24). Moody was served, as directed by the court below, both by registered and regular mail. Moody filed a motion seeking a general continuance of the criminal contempt proceedings, but the receivership court determined that a general continuance was not warranted. A conditional continuance was granted, and upon its expiration the criminal contempt proceedings commenced on September 13, 1976. The trial court, *ex mero motu,* determined not to compel Moody's attendance at the hearing; rather the decision of whether to attend in person was left to Moody. The court below considered voluminous documentary evidence and oral testimony and left the evidence open at the

[4] S. Ct. Ala. No. 1221. The request for relief was denied May 6, 1975.

conclusion of the hearing on September 13, 1976 (R. 1681-62) to permit Moody to provide testimony in explanation or mitigation of the contempt charges against him. No testimony in explanation or mitigation was ever offered by Moody and, on November 1, 1976, the trial court below treated the evidence as being closed. Moody was found to be in criminal contempt on each of four separate charges. Pursuant to tit. 13, § 9 of the *Code of Alabama*, Moody was sentenced to imprisonment in the County Jail for four consecutive five-day terms and ordered to pay four fines, each in the amount of $50.

Moody filed four petitions for a writ of certiorari in the Supreme Court of Alabama seeking review of the criminal-contempt adjudications. On January 26, 1976 the Alabama Supreme Court granted certiorari. The decision of the Alabama Supreme Court is reported, *Ex parte Shearn Moody, Jr.*, 351 So. 2d 538 (1977), and a copy of the decision is included in the appendix to the petition before this Court (A1-A22). The majority of the Alabama Supreme Court reversed two of the adjudications. As to the other two charges of criminal contempt, the Alabama Supreme Court unanimously affirmed. Specifically, the Alabama Supreme Court affirmed adjudications that Moody was in criminal contempt (1) for having willfully disobeyed the Order and Injunction entered by the receivership court on January 6, 1975; and (2) for having willfully disobeyed the Order entered by the receivership court on June 16, 1976. This Petition for a writ of certiorari in this Court ensued.

ARGUMENT

I

The Federal Questions Sought to Be Reviewed in This Court Were Not Properly Raised in the Court Below, and Are Not Worthy of Review by This Court.

Rule 23(f) of the Revised Rules of this Court requires that a petition for writ of certiorari to a state court must demonstrate with specificity that the federal questions sought to be reviewed were appropriately raised in both the state court of first instance and the state appellate court.

> "(f) If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari."

This rule embodies a long line of case authority holding that this court will not consider federal constitutional issues raised for the first time in a petition for writ of certiorari to review a state court decision. *E.g., Monks v. New Jersey*, 398 U.S. 71 (1970); *Cardinale v. Louisiana*, 394 U.S. 437 (1969);

American Surety Company v. Baldwin, 287 U.S. 156 (1932); *Missouri Pacific Railroad Company v. Hanna*, 266 U.S. 184 (1924). This Court has made it particularly clear that no jurisdiction to exercise review by certiorari exists unless the record affirmatively shows that the federal question was presented to the highest state court having jurisdiction and that its decision of the federal question was necessary to its determination of the cause. *E.g., Durley v. Mayo*, 351 U.S. 277 (1956);*Williams v. Kaiser*, 323 U.S. 471 (1945); *Honeyman v. Hanan*, 300 U.S. 14 (1937); *Lynch v. New York ex rel. Pierson*, 293 U.S. 52 (1934).

The conspicuous failure of the Petition here to comply with the requirements of Supreme Court Rule 23(f) and, concomitantly, to establish a jurisdictional basis for consideration of the Petition is attributable to the fact that the purported federal questions Petitioner seeks to raise before this Court were never raised before the Supreme Court of Alabama. The Petition likewise does not specify the manner in which such federal questions were raised before the receivership court and does not quote specific portions of the record in substantiation.

It is absolutely clear from the face of Moody's petitions for writ of certiorari filed with the Alabama Supreme Court[5] that no federal issues were raised by Petitioner before the Alabama Supreme Court:

> "16. The issues presented for review by this petition are as follows:
>
> (a) Whether the trial court had jurisdiction to try and adjudicate the criminal contempt charge against the Petitioner without personal service upon him and personal jurisdiction over him.

[5] Each of the four petitions filed by Moody in the Alabama Supreme Court presented the same ten issues for review.

> (b) Whether the Petitioner could legally and properly be tried on the criminal contempt charge against him in his absence.
>
> (c) Whether the procedural rules governing criminal contempt proceedings are the Alabama Rules of Civil Procedure.
>
> (d) Whether the petition filed by Protective Life Insurance Company was an adequate basis for the institution of a criminal contempt charge against the Petitioner.
>
> (e) Whether the order to show cause issued to the Petitioner was adequate notice of the charges against him.
>
> (f) Whether the order to show cause and the petition on which it was based stated adequate legal grounds for a charge of criminal contempt.
>
> (g) Whether the prosecution of this criminal contempt charge against the Petitioner was barred by the statute of limitations.
>
> (h) Whether the trial court admitted illegal and incompetent evidence in the trial of this criminal contempt charge against the Petitioner.
>
> (i) Whether the evidence presented in support of this criminal contempt charge was sufficient to support a conviction of the same.
>
> (j) Whether a judgment finding an accused party guilty of criminal contempt may order the accused parties to pay attorneys' fees to the attorneys who prepared and prosecuted the contempt charges against him."

Petitioner has not demonstrated and, in fact, cannot demonstrate that the federal questions he seeks to have reviewed by

this Court[6] were timely raised and preserved in the state courts. For example, Moody's claims that he was denied equal protection of the laws and that his Fifth and Sixth amendments rights were violated are not even suggested by the issues presented by him for review by the Alabama Supreme Court. Accordingly, under the settled authorities established by this Court, this Court ought not assume jurisdiction to review the judgment of the Supreme Court of Alabama.

Even if it were assumed that the questions presented in the Petition had been properly raised in the state courts below, not one of them is worthy of review. Moody seeks to inject federal issues into the case for a review by this Court without attempting any showing that he was deprived of any federal right, privilege, or immunity. Six purported federal questions are sought to be

---

[6] For convenient reference, the questions presented in the petition filed with this Court are set out below:

"1. Whether a constructive criminal contempt prosecution in which the accused may be punished by imprisonment is a criminal case and subject to the constitutional requirements, guaranties, and privileges, applicable to all criminal cases.

2. Whether service of process on the accused in a state criminal contempt prosecution which is not made in compliance with state statutes specifying methods for service of process denies the accused equal protection of the laws.

3. Whether a defendant in a state criminal prosecution in which imprisonment is a permissible form of punishment may be tried in absentia.

4. Whether allowing the use as evidence in a state criminal contempt prosecution of (a) an involuntary deposition of the accused and (b) depositions taken in other cases and transcripts of hearings in other proceedings violates the accused's right against self-incrimination and right to confront the witnesses against him.

5. Whether the refusal by a state court to apply a uniform statute of limitations to criminal contempt prosecutions denies equal protection of the laws.

6. Whether a criminal contempt conviction in a state court may be rested on a state court injunction that has the effect of proscribing a civil action in the federal courts under 42 U.S.C., § 1985 and 28 U.S.C., § 1343."

injected. Petitioner seeks an advisory opinion that a criminal-contempt proceeding in the courts of Alabama ought to be called a "criminal case" (Question 1). Petitioner invites this Court to assume that the manner in which the criminal-contempt proceedings were initiated against him denied him equal protection of the laws (Question 2), though the Petition concedes that Moody was an active party to the receivership action pending in the Alabama trial court, and though the Petition does not challenge the Alabama Supreme Court's conclusion that the criminal-contempt proceeding was properly instituted in all respects. Without attempting any showing that he was denied the right to be present at the hearing on criminal contempt, petitioner seeks an advisory opinion that a defendant in such proceeding may not be tried *in absentia* (Question 3). Without challenging in any way the Alabama Supreme Court's conclusion that his evidentiary objections were moot, at least as regards the two findings of criminal contempt sought to be reviewed in this Court (Pet., A-19), Petitioner seeks review of sundry evidentiary issues (Question 4). Without even addressing the Alabama Supreme Court's conclusion that the two contempt charges sought to be reviewed here were timely brought (Pet., A-16) regardless of what limitation period is deemed applicable, Petitioner invites this Court to conclude that he was denied equal protection of the laws (Question 5) by that portion of the decision of the Alabama Supreme Court which adopted a flexible standard by which to measure the timeliness of bringing criminal-contempt charges (Pet., A-15). Finally, Petitioner attempts to inject a federal issue into the case by collateral attack upon the injunction entered against him by the Alabama receivership court on January 6, 1975, from which he successfully appealed to the Alabama Supreme Court, ***Moody v. State ex rel. Payne***, 295 Ala. 299, 329 So. 2d 73 (1976), and from which no timely review by this Court was ever sought (Question 6).

II

The Reasons Asserted by Petitioner for Granting the Writ Are Without Merit.

Six reasons for granting the writ are asserted. First, Moody contends that the Supreme Court of Alabama erroneously relied on the decision of this Court in *Blackmer v. United States*, 284 U.S. 421 (1932). Moody urges that the writ of certiorari be granted to correct this alleged error and to resolve a purported conflict between *Blackmer* and the decisions of this Court in *Gompers v. United States*, 233 U.S. 604 (1914); *Michaelson v. United States*, 266 U.S. 42 (1924); *Bloom v. Illinois*, 391 U.S. 194 (1968); *Codispoti v. Pennsylvania*, 418 U.S. 506 (1974), and *Taylor v. Hayes*, 418 U.S. 488 (1974). As the *Blackmer* case has never been questioned, much less overruled, by this Court, any reliance on *Blackmer* by the Supreme Court of Alabama was proper in every respect and provides no basis for granting the petition for a writ of certiorari. Moreover, *Blackmer* is demonstrably not in conflict with any of the decisions of this Court cited by Petitioner,[7] and such decisions certainly furnish no independent reason for granting the relief requested. The *Gompers*, *Michelson*, *Bloom*, *Codispoti* and *Taylor* cases are clearly distinguishable in that each of them deals only with an evolving application by this Court of the Sixth Amendment right to jury trial in "serious" criminal contempts. *See Annot.* 45 L. Ed. 2d 815, 821-25 (1976). Not even Moody contends that the two criminal contempt adjudications that he seeks to have reviewed by

[7] Indeed, *Blackmer* is cited with approval in *Bloom*, 391 U.S. at 205. *Blackmer* cites *Michelson* as supporting authority, 284 U.S. at 440. The *Blackmer* conclusion that criminal contempt is *sui generis* is quoted from the case of *Meyers v. United States*, 264 U.S. 95 (1924), in which this Court rejected the proposition that the *Gompers* case supported a claim that contempt proceedings amount to a prosecution for a criminal offense within the intendment of section 53 of the Judicial Code. The *Codispoti* and *Taylor* cases are progeny of *Bloom*, and, like *Bloom*, do not conflict with *Blackmer*.

this Court (each of which involves statutory punishment of five days in the county jail), are "serious" contempts for purposes of the right to trial by jury. As the Alabama Supreme Court's reliance on *Blackmer* was proper, and as *Blackmer* does not conflict with the cases cited by Petitioner, it is clear that Petitioner's first reason for granting the writ is without merit.

A. The contempt proceeding was properly instituted.

Moody's argument that the method utilized to initiate the criminal-contempt proceedings against him had the effect of denying him equal protection of the laws is without merit. Moody was a party to the receivership action, and he entered a general appearance in the related criminal-contempt proceedings.[8] Each of three of his attorneys of record were served with the show-cause orders, together with all papers upon which they were based (R. 7). Moody himself was served both by registered and regular mail. He had actual knowledge of the criminal-contempt proceedings, and his attorneys participated actively in the hearing. The petition in this Court fails to make any showing that the methods of service denied him equal protection of the laws; that contention, moreover, was not raised at all in the lower courts. Moody has not and cannot point to any disparity in treatment by the State of Alabama, and this case does not present the slightest suggestion of invidious discrimination, such as that condemned in the only case cited by Moody, *Griffin v. Illinois*, 351 U.S. 12 (1956).

[8] Moody's motion for a continuance of the contempt proceedings constituted a general appearance under Alabama law. *Persons v. Summers*, 274 Ala. 673, 680, 151 So. 2d 210 (1963). See 5 AM. JUR. 2d, *Appearance* § 24, at 498 (1962).

B. **Moody was not denied the right to be present.**

Moody next argues that he was tried in his absence in violation of the Sixth Amendment. The cases relied upon by Moody do not support the proposition that the Sixth Amendment right of the accused in a criminal prosecution to be confronted with the witnesses against him is applicable in the Alabama criminal-contempt proceedings.[9] *Blackmer v. United States*, 284 U.S. at 440, squarely supports the proposition that a criminal-contempt proceeding may go forward in the absence of the alleged contemnor. As demonstrated *supra*, *Blackmer* is not at odds with the *Gompers-Bloom* line of cases. Ironically, the case which best supports Moody's contention that he had a right to be personally present at the hearing is the very decision of the Alabama Supreme Court that he seeks to overturn in this Court.

> "In this case, Moody was not denied the right to be present. Instead, every opportunity to be present was afforded the accused. . . . This is clearly a case where Moody had the right to be present, but waived that right by his actions."
>
> 351 So. 2d at 543
>
> (Pet., App. at A-14-15).

The petition does not and cannot show that the above conclusions of the Alabama Supreme Court were erroneous, for they are abundantly supported by the record.

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[9] Moody asserts that the cases of *Lewis v. United States*, 146 U.S. 370 (1892), and *Illinois v. Allen*, 397 U.S. 337 (1970), support his argument that the contempt hearing in his absence violated the Sixth Amendment. Nonsense. The *Lewis* case involved an appeal from a murder conviction, not a petty contempt adjudication. Moreover, *Lewis* acknowledges that the rule that nothing shall be done in the absence of the prisoner has been relaxed, at least in misdemeanor cases. 146 U.S. 372. Finally, *Lewis* was effectively rejected by this Court in the only other case cited by Moody, *Illinois v. Allen, supra.*

> "The broad dicta in . . . Lewis v. United States, 146 U.S. 370 [36 L. Ed. 1011, 13 S. Ct. 136] (1892), that a trial can never continue in defendant's absence have been expressly rejected."

397 U.S. at 342.

C. **Moody's argument based on the limitations period is without merit.**

Moody next argues that the limitations standard applied by the Alabama Supreme Court denied him equal protection of the laws. The standard applied by the court below involves no disparity of treatment and no invidious discrimination. (Pet. A-15). In effect, Moody asks this Court to require that the State of Alabama apply its one-year limitations statute for misdemeanors to criminal-contempt proceedings, contrary to the manifest intent of the Alabama Legislature and the express holdings of the Supreme Court of Alabama that criminal contempt is not a misdemeanor within the meaning of the pertinent Alabama statutes. *E.g., International Brotherhood of Elec. Workers v. Davis Const. & Eng'rs, Inc.*, 334 So. 2d 892 (S. Ct. Ala. 1976). There is no basis in the record for this Court to wrest supervisory jurisdiction over inferior courts of Alabama from the Supreme Court of Alabama, and neither of the cases cited by Moody support such a result. This Court in *Gompers, supra*, and *Pendergast v. United States*, 317 U.S. 412 (1943)—the cases relied upon by Petitioners—construed a federal statute of limitations to govern criminal contempt; such cases in no way present an obstacle to the Alabama Supreme Court's construction of the Alabama statute of limitations for misdemeanors as not applying to criminal-contempt proceedings in the courts of Alabama.

Finally, as to the two contempt charges sought to be reviewed here, the Alabama Supreme Court found as facts that one was based on "continuing acts" by Moody which would extend *any* limitations period deemed applicable (A. 16), and the other charge was brought within one month of the occurrence of the contemptuous act (*Id.*). Thus any review by this Court of the standard of timeliness adopted by the Alabama courts would be merely advisory.

D. **Moody's evidentiary objections are without merit.**

Next Moody argues that certain documentary evidence was received in violation of his Fifth and Sixth Amendment rights. The evidentiary rulings of the Alabama trial court accorded Moody the full measure of his constitutional rights. At the time Moody submitted to the deposition challenged in this Court, he had been adjudicated in civil contempt on the basis of a plenary evidentiary hearing at which no constitutional rights were invoked. As regards the other challenged evidence, the Petition fails to show that the Sixth Amendment right to be confronted with witnesses was applicable to the contempt hearing, and no showing is or can be made that Petitioner did not have an adequate opportunity, through counsel, to cross-examine the witnesses.[10]

The disposition of Moody's evidentiary objections by the court below is unassailable in this Court for the independently sufficient reason that the Alabama Supreme Court determined that the evidentiary issues were moot (A. 19). As Petitioner does not challenge the mootness determination in this Court, the evidentiary issues are beyond review.

E. **The January 6, 1975 injunction presents no reason for granting the writ.**

Moody's final argument is that the contempt proceedings against him were based on an unconstitutional exercise of power by the Alabama courts. This argument addresses only one of

[10] *Pointer v. Texas*, 380 U.S. 400 (1965), does not support Moody's contention. *Pointer* did not involve petty criminal contempt; rather it dealt with review of an armed robbery conviction predicated on transcribed testimony of the victim of the robbery, which had been taken at a preliminary hearing. The victim's testimony identified Pointer as the man who had robbed him; Pointer was not represented by counsel at the preliminary hearing and did not cross-examine the victim.

the two contempt findings sought to be reviewed in this Court; the other finding is based on Moody's disobedience of the receivership court's order of June 16, 1976. The contention is that the January 6, 1975 injunction of the receivership court, which enjoined Moody from interfering with the receivership proceedings, is contrary to the case of *Donovan v. Dallas*, 377 U.S. 408 (1964). The January 6, 1975 injunction is beyond review by this Court. The injunction was entered over three years ago at the conclusion of a plenary hearing in the receivership court, at which Moody was represented by counsel. No objection was raised by Moody that the injunction was unconstitutional in any respect. Moody perfected an appeal to the Alabama Supreme Court where he raised for the first time the contention that the injunction was contrary to the *Donovan* case. A unanimous Alabama Supreme Court affirmed the injunction and specifically rejected the contention that the injunction was defective under *Donovan*. *Moody v. State ex rel. Payne*, 295 Ala. 299, 329 So. 2d 73 (1976). Moody sought no review in this Court of the affirmance of the injunction by the Alabama Supreme Court. Petitioner's belated collateral attack upon the January 6, 1975 injunction is baseless. Finally, even if it be assumed, *arguendo*, that the January 6, 1975 Injunction was invalid, Moody cannot avoid punishment for contempt after disobeying it. *Walker v. City of Birmingham*, 388 U.S. 307 (1967).

CONCLUSION

Based on the foregoing authorities and analysis, the petition is due to be denied.

Respectfully submitted,

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Proof of Service

Proof of service of three copies of Respondent's Brief in Opposition to Petition for a Writ of Certiorari upon all parties separately represented by counsel was filed by William A. Robinson, a member of the bar of the United States Supreme Court, with the Clerk of the United States Supreme Court on the same date the brief in opposition was filed.